CHAPTER VII. (pghs 56-75)
THE SOURCE OF POLITICAL AUTHORITY.

IN order to consider the theory of the civilians as to the source of the authority of law, and the place of custom in making law, we are compelled to extend the scope of our inquiry, and to ask what they thought as to the source or original fountain of political authority. We have to ask, first, with whom it was that originally there lay the power of making laws,—who were the original sources of political authority; and next, who was the actual lawgiver, the actual holder of political authority.

The great jurists of the Digest recognised one, and only one, source of political authority in the empire, that is, the Roman people, and the emperors themselves, as late as Justinian, acknowledged this as the true theory.[1] We want now to inquire what was the position taken up by the mediaeval civilians down to the middle of the thirteenth century with respect to this theory, and the conclusions which they derive from it with regard to the nature of political authority. These jurists restate the theory of the *corpus juris,* but they do not merely restate it, they also discuss with some care the bearing of the theory on the political conditions of their own time.

We may find a convenient starting-point for our discussion by noticing a definition of the *universitas* and its functions which we find in the little treatise, ‘ De 2Equitate,’ which Prof. Fitting has edited, and has ascribed to Imerius. It is the function of the *universitas,* that is, of the *populus,* says the author of this treatise, to care for the individual men who compose it, as for those who are its members, and hence it comes that it makes law, and interprets and expounds the law when made, since it is by the law that men are taught what they should do and what they should not do.[1] We may compare with this a gloss of Irnerius on Papinian’s definition of *lex,* in which Irnerius treats the *populus* as being identical with the *respublica,* and says that the *populus* commands in virtue of the authority of the *universitas,* and undertakes obligations in the name of its individual members.[2] We may again compare with this an interesting phrase in that treatise on the fiftieth book of the Digest which Savigny identified as the work of Bulgarus. The author is commenting on a saying of Paulus, in which it is laid down that individuals are not allowed to perform those actions which belong to the public duty of the magistrate, lest this should prove the cause of disorder, and he explains this by saying that judicial authority has been established lest individuals should make laws for themselves; this power is reserved to the *universitas,* that is, the *populus,* or to him who represents *(pbtinet vicem)* the *universitas,* as the magistrate does.[3] It is interesting to observe that we have here not only a statement of the supreme authority of the *populus,* but also of the doctrine that all magisterial authority is representative. These passages present a clear exposition of the principle that the legislative authority of society is founded upon the natural relation between a society and its members, and that if this authority is intrusted to any particular person it is in virtue of some representative character in him.

These general conceptions find a concrete exemplification in the position of the Roman people, and of the Roman emperor upon whom the Roman people have conferred their authority. In the ‘ Summa Codicis,’ which Professor Fitting has edited and attributed to Imerius, we find a phrase analogous in its general conception to that which we have just quoted from the ‘ De JSquitate,’ with regard to the relation of the *universitas* or *populus* to its members, but the phrase also transfers this principle to the case of the Roman State. The authority to make laws belongs, the author says, to the Roman people, and to the prince to whom the people have given this authority, for it is the duty of the people or the prince to care for the individuals, as those who are members and children of the State.[1] The Roman emperor exercises the legislative authority in virtue of the fact that the Roman people has given him authority; his action is that of a representative, or, as Placentinus, in a passage setting out the source of legislative authority, calls him, a vicar.[2]

We need not multiply citations to prove that the mediaeval civilians, with whom we are dealing, have all accepted from the *corpus juris* the principle that the authority of the Roman emperor is derived from the grant of the Roman people. They not only repeat the phrases of the

Digest or Code, but it is clear that they accept these as the foundation of their theory of political authority.

It is interesting to observe that Azo at least has explicitly applied this theory of the derivation of all authority from the people to the case of the Senate, while the jurists of the Digest can only be said to imply such a view. Both Gaius and Pomponius certainly seem to suggest that the legislative authority of the Senate rested upon the tacit if not expressed authority and consent of the whole people, but they do not directly say this.[1] Azo uses some authority which drew out the derivation of the authority of the Senate from the people in explicit terms, and relates how, when the people became very numerous, it was difficult to summon them for the purpose of making laws, and so the people elected one hundred senators, that they might take counsel on behalf of the people *{vice populi),* and ordered that whatever they should decree should have the force of law.[2]

We must now go a step further, and consider the theory of these jurists as to certain questions that arise out of these principles. The ancient lawyers, while stating that the people had conferred all their authority upon the emperor, do not expressly say whether, in doing this, they had renounced altogether their own authority, or whether they could possibly still exercise this either by direct legislation or by the force of custom. It is true that Justinian at least in one passage of the Code speaks of the emperor as being actually the sole legislator,[3] and that Constantine in the Code says that custom cannot prevail against law,[4] but how far these phrases represent the general judgment of the ancient jurists is uncertain.

This is just the point on which our mediaeval civilians differed or were doubtful: there were those who maintained that the people had in such a sense transferred their authority to the emperor, that they could not resume it, and that even the custom of the people had lost its authority in making and unmaking law, while others were inclined to hold that the people retained something of their old power, or at least the right of resuming it. On the one side we find, along with others whose names we cannot recover, Irnerius, in a gloss, Placentinus, and Roger, and on the other side Bulgarus, Joannes Bassianus, Azo, and Hugolinus, and their view again seems to have been supported by others whose names are unknown.

In one of the glosses of Irnerius on the Digest, which Savigny published, we have a comment on the saying of Julianas that custom has the force of law, makes and unmakes law (Dig., i. 3. 32). Irnerius urges that this was once true, but that the statement belonged to the time when the people had the power of making laws, but nowadays, when this power has been transferred to the emperor, the custom of the people can no longer abrogate law.[1] Placentinus is even more emphatic in his assertion of the view that the people have wholly parted with their authority. He describes " our law " as written and unwritten, but the latter, he says, cannot abrogate the former, for the people have transferred their authority to the prince and have reserved none to themselves, and he explains away the phrase of Julianas by saying that this only means that unwritten laws are abrogated by other unwritten laws—that is, one custom by another.[2] The judgment of Roger, in his commentary on the Code, is equally clear. He says indeed plainly that the legislative authority of the people preceded that of the emperor, and that it was from them that the emperor had received his authority; but this only brings out more clearly the fact that he maintains that " now " only the emperor and the man to whom the emperor has granted authority can make laws.[1]

We might have supposed from the confident tone of these statements that this was the only view generally current among the civilians in the twelfth and thirteenth centuries. When, however, we examine the literature more carefully we discover that some of them hold another tradition. The collection of " Dissensiones " of the great lawyers contained in the ' Codex Chisianus ' includes a very elaborate discussion of the relations of Custom and Law, and of the effect upon the authority of Custom of the terms under which the people created the emperor. Some writers are mentioned as maintaining that no custom can override the written law, and this for the special reason that the prince is now the sole legislator, while some are mentioned as maintaining that only a universal. custom which is approved by the prince can override written

law. But on the other hand there are cited the views of some who maintained that either generally, or in certain cases, custom still prevailed against law. Some are cited as maintaining that customs which are contrary to law are to be observed when they are of such a nature that they could be confirmed by an agreement or contract, for custom is nothing but a tacit contract, but not otherwise. Others again are said to hold that a written law which has been ratified by custom cannot be abrogated by custom, but if the written law has not been ratified, then custom can in some cases render the law void. Others again held that a good custom can abrogate law, but not a bad one. More important, however, is the opinion of those who maintained that, while the custom of the people, which has grown up through their ignorance of the law, cannot override the law, that custom which the people have deliberately adopted in contradiction to the law does amend it; and again, the view that while a merely local custom cannot override the law, the universal custom of the people of the whole empire does this.[1] It is clear that the civilians who are referred to, unfortunately only occasionally by name, were greatly divided; that while there were some who held that the Roman people had completely transferred their authority to the emperor, there were others who maintained that the Roman people had always reserved to themselves the authority which they had exercised through their custom.

In the works of Azo, and specially of Hugolinus, we find these positions drawn out more completely, and the conclusions which might be founded on them more explicitly stated. Azo discusses the question of the force of custom in commenting on that rescript of Constantine which we have just cited. What, he asks, is the authority of custom ? It makes, it abrogates, and it interprets law, and he cites Dig., i. 3. 32, 33 and Inst., i. 2. 9. There are however, he adds, certain persons who maintain that the true principle nowadays is represented by the phrase in Constantine's rescript, and that all power has now been transferred by the people to the prince; or again such persons maintain that the principle of Dig., i. 3. 32, only applied to the case of customary laws, which could be overriden by custom, or to the authority of a general custom which had the sanction of the prince. We must, he adds, be careful to consider whether a law which is opposed to a custom, followed or preceded it; in the former case, the law will override the custom, in the latter the custom will override the law.[1] The discussion is very much on the same lines as that of the ' Codex Chisianus,' but it is fairly clear that Azo himself looks upon the custom of the Roman people as still possessing the force of law. His meaning in this passage finds its best comment in another passage of his work on the Code, in which he discusses the, nature of law, and the persons by whom law can be made. He mentions first the emperor, who is to make law with the advice of the *procures sacri palatii,* and of the Senate; then the Praetorian Prefect, and those persons to whom the emperor gives this authority; finally, he adds, perhaps even today the Roman people can make law, for though its authority has been transferred or conceded to the emperor, this does not mean that the people has wholly abdicated it: once before, the people transferred their authority, but afterwards they resumed it.[2] This is a passage of much importance : it goes indeed much further than the theories about the enduring importance of the custom of the Roman people which we have so far considered; it carries much further the conception that all political authority ultimately rests with the people. It is certainly of great importance to find an eminent civilian like Azo maintaining that the Roman people had not irrevocably surrendered its authority, and might perhaps resume it again, as it had done before.

Azo's position would be interesting, even if he stood alone, but his conception of political authority has a much greater interest when we observe that Hugolinus, a pupil, along with Azo, of Joannes Bassianus, holds the same principles, but expresses them with more confidence and emphasis. In his ' Distinctiones ' he discusses the relation of law and custom in terms which are in large measure similar to those of the passage we have quoted from the ' Codex Chisianus '; but he also expresses with great clearness his own judgment on certain questions arising out of this. Placentinus, he says, had maintained that custom could not abrogate written law, and had interpreted the passage from Julianus in Dig., i. 3. 32, as referring only to those ancient days when the people had full power to make laws, and held that after they had transferred their authority to the emperor, they had ceased to possess this. Hugolinus himself bluntly and emphatically contradicts this, and maintains that the Roman people never transferred their authority to the emperor in such a sense that they ceased to possess it, while the position of the emperor, he maintains, is that of a *procurator ad hoc.* He adds the very important information that Bulgarus and Joannes Bassianus had taught that a universal custom abrogates law, and that

even the local custom of a particular city does so within that city, if the custom has been adopted knowingly or deliberately.[1]

We have, then, in Azo and Hugolinus, drawn out in explicit phrases the principle which underlies the theory of the enduring force of custom in making law,—the principle, that is, that the Roman people continued, at least in some sense, to be what they had always been, the source of all legislative authority, of all political power. It is, indeed, impossible, on the evidence before us, to determine whether this judgment was more or less widely held than that which maintained that the Roman people had completely transferred their authority to the emperor, and that even their customs had ceased to have authority. We have cited passages which show that this was maintained by Imerius, Placentinus, and Roger; but against these must be set the names of Bulgarus and Joannes Bassianus for the continuing legislative authority of custom, and of Azo and Hugolinus as holding that the Roman people had never parted with their authority in such a sense that they could not resume it.

It would seem, then, to be clear that as late as the middle of the thirteenth century the civil or Roman lawyers were unanimous in holding that the *populus* was the ultimate source of all political authority, that they recognised no other original source of political authority than the will of the whole community. In the first volume of the work we have endeavoured to show that this was the principle of the ancient Roman jurisprudence; the mediaeval civilians not only inherited these phrases, but understood and even developed the principles of the ancient law, for, as we have seen, they not only held that the *universitas* or *populus* is the source of law, but some of them at least recognise that this is the natural result of the relation between a society and its members. We have just seen that some of these civilians also maintained that the Roman people still continued to be the actual source of all political authority, that their custom still both made and unmade law, and that as they had once delegated their authority to the emperor, so they might, if occasion arose, resume that authority.

There remain some interesting and important questions as to the theory of the civilians with respect to the mode in which the emperor was to exercise the authority intrusted to him by the people, and as to the extent of this authority. And first, we inquire into their theory as to the method of legislation by the emperor. Here again we find a sharp division of opinion, some maintaining that the simple letter or rescript of the emperor has the force of law, others that the emperor had to go through certain forms, and to obtain the assent of certain persons before he could promulgate a new law. This division of opinion arises directly out of a difference as to the interpretation and the permanent authority of certain passages in the Code.

The ‘ Libellus de Verbis Legalibus ’ defines a “ Pragmatic Sanction ” as a new constitution devised by the Senate, and bearing upon some new and difficult question submitted by the emperor.[1] This definition only refers to one particular form of imperial legislation; but it is suggestive to find that, in the view of the mediaeval civilians, the Pragmatic Sanction required the advice or authority of the Senate. When we turn to Irnerius we find him laying down a general principle

of great scope and importance. In a passage, of which we have already quoted a part,[1] he discusses the question by whom and by what process laws are to be made, and says that laws are made by the Roman people, or by that person to whom the Roman people have given their authority, while the manner in which laws are to be made is defined by the constitution of Theodosius and Valentinian—that is, they are to be first considered by the chief men of the court, and especially by the Senate, and after that they are to be promulgated. This, Imerius adds, is the true method of legislation, for law is an ordinance of the people, promulgated with the advice of the wise men of the community.[2]

It is very important to notice that this principle is maintained by Imerius, and that several civilians follow him. Roger is very clear and emphatic in asserting this view, and says that, in making laws, the emperor is to follow the forms prescribed by the constitution of Theodosius and Valentinian.[3] Azo has discussed the matter very fully, and is equally clear. He first defines the

nature of the constitution of this prince, distinguishing between this and the edictum, and then asks by whom these imperial laws are to be made. He answers that they are to be made by the emperor, with the council of the notables of the sacred " palatium," and in the assembly of the senators. A law is to be considered twice, and finally, if all agree, it is to be read in the sacred " palatium " or consistory, that it may be confirmed and promulgated by the prince.[4] We must, however, notice that the view of Bulgarus is quite different. In a gloss on Cod., i. 14. 3, he says that there were some who wished to conclude from this constitution that the Lombard law was no law at all, inasmuch as it was not issued with this procedure : Bulgarus himself emphatically repudiates this conclusion, and maintains that Theodosius could not impose a law on the emperors who succeeded him, but could only give them his advice; the formalities, therefore, prescribed by the constitution of Theodosius and Valentinian need not be observed.[1]

Clearly there was a division of opinion among the civilians, but it is extremely interesting and important to observe that some of the most important among them should have so dogmatically held the view that the legislative authority of the emperor could only be exercised with the counsel and consent of the Senate. It would seem probable that the civilians may have been influenced by the general constitutional principle of the new Teutonic States, but it is also interesting to observe the continued or revived influence in the West of these clauses of the fourteenth title of the first book of the Code. There does not appear, as far as we can find, to be any very careful discussion of the significance and importance of these rescripts of Theodosius and Valentinian. It would seem as though they were intended in some measure to revive the legislative functions of the Senate. It seems to be clear that Justinian did not regard them as in any way binding upon him,[1] and it would seem that the attempt to revive the functions of the Senate had little immediate effect; but it is possible that these rescripts may have exercised a greater influence in the West than we are at present aware of. It is worth while to observe that the " Dissensiones Dominorum," contained in the ' Codex Chisianus,' indicate that certain civilians maintained that the Senate still possessed the power of making and abrogating law.[2]

Some of the civilians then maintained dogmatically that the emperor or prince had no arbitrary authority in legislation; it is important to observe that some at least of the civilians maintained that his authority was always in some measure limited by the law. Azo discusses the question how far the emperor could issue rescripts or *privilegia* contrary to the law, and says that such *privilegia* are invalid if they do serious injury to any one, unless the emperor inserted a *non obstante* clause : he adds that it must not be assumed that the prince intended to act against the law, unless he definitely said so, inasmuch as at the beginning of his reign he swore to observe the laws.[3] We may perhaps here again trace the influence of contemporary and traditional Teutonic custom on the civilians.

There is an interesting discussion of the question of the limitation of the emperor's authority in the ' Questiones Juridical ' *of* Pillius, a civilian of the latter part of the twelfth century. The particular point discussed is the question whether a sentence given by the emperor in an appeal case would be valid if both parties to the case had not been summoned to appear. Pillius first gives the reasons for holding that such a judgment would be valid, and enumerates some of the most noteworthy examples of the authority of the prince : he can emancipate a slave, he can make the freedman *ingenuus,* he can legitimatise a bastard, he can ennoble a man of humble station, he can make a rich man poor; the emperor can make law, can amend it, can abolish it, can interpret it; if he can do all these things, who can really doubt that he can give judgment without summoning both parties to a case. Further, every secular power is inferior to him,—who then can discuss his judgment ? certainly not his inferiors; and, even if you could find an equal to the emperor, he could not annul his sentence, or even take cognisance of it. On the other hand, it is contended, Pillius says, that the judgment of the prince under such circumstances is invalid, for there are many things that he cannot do; for instance, he cannot annul a sale, or a testament, or a donation, he cannot confer a monopoly, he cannot enact anything contrary to *jus* and *lex.* If he cannot do any of these things, much less can he act in a manner so contrary to legal order as to give judgment without hearing both sides. Pillius concludes by giving his own opinion, which is very cautious; he holds that no judge can set aside the sentence of the prince, but that the prince himself should correct it.[1] Pillius has carefully balanced the arguments for and against the

limitation of the imperial authority; for us it is important to recognise that the question of the limitation of the imperial authority was discussed in the law schools.

There remains one aspect of the theory of the imperial authority in these civilians which we must consider—that is, the theory of the relation of the emperor to private property. Savigny has put together the traditions as to the differences among the Bologna doctors when consulted by Frederick Barbarossa, about the imperial rights over private property, some of them maintaining that the emperor was really the lord of all property, while others denied this.[1] It is clear that there was much difference of opinion among the civilians of the twelfth and thirteenth centuries with regard to the subject. The earliest discussion of the matter which we have found in this period is contained in Irnerius' ' Summa Codicis '; according to the text which Professor Fitting considers to be the original, he holds a clear and decided opinion upon the subject, and maintains that any person who accepts from the prince property which belongs to another man may be compelled to make restitution: no rescripts, he adds, procured by fraud, or contrary to the law, or injurious to others are to be received; they are in error who maintain that the prince can seize a man's goods and give them to another, without due cause—such a proceeding is condemned by the law of the courts and of heaven.[2]

It is a curious thing to find that a Bologna MS. of this same work has a wholly different text in this passage, and seems to represent a defence of the view that the emperor can take a man's property and give it to another.[3] Professor Fitting has suggested that this text represents a modification of his original view by Irnerius himself, in consequence of his being in the imperial service.[4] However this may be, these texts will serve as illustrations of the diversity of opinion among the civilians upon this subject. We find the matter further illustrated in the collection of the " Dissensiones " of the early jurists. In the collection made by Hugolinus, some jurist is reported to have said that the emperor could transfer one man's property to another.[1] In the similar collection made by Roger, he states that some maintained that the prince could alienate a man's property whether he knew that it was the man's and not his own, or was ignorant of this, and that this was founded on Cod., vii. 37. 3, but adds that Jacobus, one of the four doctors, the immediate successors of Imerius in Bologna, maintained that this law was only applicable to cases where the emperor was ignorant that the property was another man's.[2] Another collection cites Martinus, also one of the four doctors, as agreeing with Jacobus.[3] Azo discusses the question in his ' Brocardica,' and agrees with Martinus and Jacobus, but also holds that the emperor can make grants of that property which is in part his, and even of that in which he has no share, if this is for the benefit of the State and the public utility demands it.[4] If we attempt to sum up our impression of the theory of political authority which was held by these civilians, we are led to the conclusion that the conception of the revived study of the Roman law as unfavourable to the progress of political liberty, while it may contain some elements of truth, requires at least very considerable qualification—at least, so far as its influence in the twelfth and early thirteenth centuries is concerned. We have seen that these civilians are unanimous in recognising that the people is the only ultimate source of political authority and of law. This was not indeed a conception strange to the Middle Ages, for the normal conception of the new Teutonic States was that law and political authority proceeded from the nation as a whole; but while the conception was not strange, it was probably a thing of much importance that the representatives of the legal traditions of the ancient civilisation should have held the same principle as those who represented the new order. It is quite true that a section of the civilians held that the people had wholly parted with their original authority, and that some of them attributed to the emperor the possession of an almost unlimited authority; and so far it is true to say that the influence of the revised Roman law was unfavourable to the progress of political freedom. But against this must be set the fact that some of the most important of these jurists held very different principles—that some of them maintained that the legislative authority of the people had never been transferred to the emperor in such a sense that they had wholly and for ever parted with it, but that rather the people might at any time resume the authority which they had bestowed; while some of them also maintained that the emperor possessed no unrestricted authority—that his legislative functions could only be exercised with the advice of the Senate, and that he possessed no unlimited power over the property of his subjects.